Supreme Court, U.S.
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No. 02-1866

IN THE

Supreme Court of the United States

Keith Shwayder,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This case, more so than all but a handful of cert. petitions, cries out for resolution by the Supreme Court. It presents one question that has been flagged by this Court as meriting review and another that has been recognized as the subject of a square circuit conflict by federal and state courts and commentators. These questions, furthermore, present important and frequently recurring issues of federal constitutional law governing the conduct of counsel in criminal proceedings, and thus directly implicate the Court's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat* v. *United States*, 486 U.S. 153, 160 (1988). Conflicts of interest of the sort presented here "have arisen in numerous cases throughout the country and are likely to continue to occur at a significant rate." Ethics Experts Br. 5. These facts present a "prototypical case" of the conflict that ensues when an attorney's former client takes the stand against his present client, presenting the attorney with the "impossible choice" of betraying his loyalty to one or the other. *United States* v. *Almeida*, No. 01-11553, 2003 U.S. App. LEXIS 16862, at *14 (CA11 Aug. 18, 2003) (published opinion).

The undisputed facts of the case are well developed and particularly egregious, providing an ideal vehicle for resolving the questions presented. Petitioner was convicted and sentenced to more than seven years in prison based principally on the testimony of a witness, Michael Swan, who had previously been represented by petitioner's own counsel.[1] Counsel's representation of both clients involved criminal proceedings regarding the same bribery scheme. Not even the government disputes that Swan was at the heart of all the criminal activity in this case, yet petitioner's counsel, faced with his continuing

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[1] In support of the convictions, the government cites to its own briefs on appeal (see BIO 2-3), no doubt because the principal *evidence* against petitioner was the testimony of the former client at the heart of the conflict of interest in this case.

duties to Swan, entered into a joint defense agreement with his former client rather than attacking him. Throughout the opening statement and the government's presentation of its case, petitioner's counsel did not utter a single word designed to place responsibility where it belonged – on Swan – or otherwise attempt to undermine Swan's credibility. The sole sentence which the government – like the court below – cites to the contrary does not even *remotely* allude to Swan's responsibility: "Now as the Judge told you yesterday, you need to make your decision on each individual defendant independently, but the question is going to be knowledge." BIO 3 (quoting counsel's opening statement). Only midway through the trial, after Swan entered a guilty plea and agreed to testify against petitioner, did petitioner's counsel even broach the issue of Swan's responsibility. And the jury could not have regarded that meager effort –on the heels of extensive proceedings in which petitioner's counsel had insisted on Swan's innocence – as anything but desperation.

Two issues arise on these facts. The first is the fundamental issue that *Mickens* v. *Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 1245-46 (2002), explained "remains * * * an open question": to what extent the "adverse effect" standard of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), applies to cases of successive representation. The Ninth Circuit requires a more rigorous showing for defendants alleging conflicts of interest in cases of successive representation (*United States* v. *Christakis*, 238 F.3d 1163, 1169 (2001)), while several other circuits have continued, post-*Mickens*, to apply the *Sullivan* standard to all cases of successive representation. See Pet. 13. Petitioner, by contrast, urges this Court to adopt the middle position held by the Sixth Circuit: that the *Sullivan* standard applies in cases of successive representation so long as the current and prior matters are closely related. See, *e.g.*, *Moss* v. *United States*, 323 F.3d 445, 462 (CA6 2003).

Second, this Court should use this case to resolve the widely acknowledged split in circuit authority over the meaning of the *Sullivan* "adverse effect" standard. Although the government alleges that the various standards applied by the

circuits are in theory reconcilable, the case law described in the petition for certiorari (and *infra* at 5-10) clearly demonstrates that in practice, they are very different. To determine that no "adverse effect" took place, the Ninth Circuit demands only the roughest "basic" similarity between counsel's actual strategy and the alternate strategy he could have pursued – *i.e.*, that counsel pursued the same general "type of representation." In this case, given counsel's outrageous failure to attack the main witness against his client until it was far too late to have a chance of persuading the jury, the Ninth Circuit's conclusion that counsel "carried out precisely the type of representation Shwayder maintained" that he failed to provide is insupportable – and demonstrates the tremendous weakness of its highly subjective "basic strategic decisions" test in comparison to the scrutiny of counsel's performance undertaken by the majority of circuits under the "alternative defense strategy" test. Only the majority rule provides criminal defendants with a meaningful guarantee of unconflicted representation, and this Court should endorse it here.

Certiorari accordingly should be granted.

I. This Case Is An Ideal Vehicle To Decide The Extent To Which The *Sullivan* Standard Applies In Cases Of Successive Representation.

The government does not deny that in *Mickens*, this Court identified as open, and suggested that it would in an appropriate case decide, the question to what extent *Sullivan*'s "adverse effect" standard, rather than *Strickland*'s "prejudice" requirement, applies in cases of "successive" representation. Nor does it contest that this issue ought to be decided. Instead, the government contends only that this case "does not present an appropriate vehicle for resolving that question" (BIO 7): "[b]ecause petitioner was not aggrieved by the court of appeals' selection of the *Sullivan* rather than the *Strickland* standard, petitioner has no basis for petitioning from that aspect of the decision" (*id.* 9). That argument is doubly wrong.

First, the first question presented does not involve a stark choice between clearly defined standards announced in *Sullivan*

and *Strickland*. The test required by *Sullivan* is the subject of substantial disagreement in the lower courts. See *infra* at 5-10. In the Ninth Circuit (unlike some other circuits (see Pet. 13)), it is settled that a more rigorous showing is required under *Sullivan* in successive representation cases (see *Christakis*, 238 F.3d at 1169), a conclusion it recently re-affirmed in *Belmontes* v. *Woodford*, 335 F.3d 1024, 1048 (2003). Because petitioner contends that the Ninth Circuit applied an unduly rigorous standard, the petition properly raises the question "[w]hether *and to what extent* the presumption of prejudice from conflicting representation adopted in [*Sullivan*] applies in cases of successive representation." Pet. i (emphasis added).

Second, and independently, there is no question of petitioner's "standing" to raise this issue. This is not a case in which the petition seeks review of a claim on which the petitioner prevailed below. If the court of appeals had granted petitioner relief on an unrelated issue – such as his sentencing – he would have no standing to seek further review of that question. But in this case, the first question presented simply identifies an issue that this Court must necessarily resolve in the course of addressing petitioner's Sixth Amendment claim. Put another way, even if petitioner had not labeled the issue as a separate "question," it would properly be before the Court, not least because the government would be able to defend the judgment on the ground that *Sullivan* is inapposite to cases of successive representation.

This is furthermore an ideal case in which to resolve the issue identified by this Court in *Mickens* through a balanced holding that recognizes the grave dangers of attorney conflicts in certain specific circumstances. Neither the court of appeals nor the government disputes that petitioner's counsel labored under serious conflicts because he had represented Swan in a *very closely related* matter. The attorney had served as counsel to Swan not merely "in legal proceedings arising from Teletek's activities" (BIO 3), but in grand jury proceedings in which Swan was being investigated for the identical bribery scheme for which he was charged and confessed his guilt in this case. When, as here, the conflict is stark and experience teaches that

its adverse effects on the current client's representation are apt to be severe, *Sullivan*'s "adverse effect" standard logically applies. See Pet. 13-15.

II. This Case Squarely Presents The Recurring Conflict Over The Meaning Of The "Adverse Effect" Requirement Of *Cuyler* v. *Sullivan*.

1. The widely acknowledged "split in circuit authority" (*Quinones* v. *Miller*, No. 01-Civ-10752, 2003 U.S. Dist. LEXIS 9176, at *122 (S.D.N.Y. June 3, 2003) (report and recommendation)) and state court decisions over the test for determining when an attorney conflict of interest causes an "adverse effect" on the client's representation is widely recognized, firmly entrenched, and outcome determinative here. The petition and *amicus* briefs collect federal and state court decisions and commentary recognizing that this Court's rulings are "rather vague" (*Beets* v. *Collins*, 65 F.3d 1258, 1265 (CA5 1995) (en banc)) and that as a consequence the lower courts long "have been confused about the test to apply" (*State* v. *Jenkins*, 715 P.2d 716, 719 (Ariz. 1986)). See Pet. 15; see also *Burger* v. *Kemp*, 483 U.S. 776, 799 n.6 (1987) (Blackmun, J., dissenting) ("The distinction between a prejudice showing and a showing of adverse effect on an attorney's performance apparently has been difficult for some courts to discern."), *cited in* NACDL Br. 14; *Skinner* v. *Duncan*, No. 01-Civ.-6656, 2003 U.S. Dist. LEXIS 10102, at *169 (S.D.N.Y. June 17, 2003) (report and recommendation) (expressly recognizing that the federal courts of appeals are "split"). The Ninth Circuit's decision here is reflective of the minority of "circuit court decisions [that] seem to apply the *Strickland* standard of deferring to counsel's 'trial strategy' rather than applying *Sullivan*'s 'adverse effect' standard," an approach that "seems plainly contrary to Supreme Court precedent, as it would eviscerate the less deferential standard announced by the Supreme Court in *Cuyler* v. *Sullivan*." *Skinner*, 2003 U.S. Dist. LEXIS 10102, at *168 n.80 (report and recommendation) (emphasis added).

In the face of this clear circuit split, the government merely retorts weakly that there is "no *inherent* conflict" or "*necessary*

inconsistency" (BIO 11, 13 (emphases added)) between the "alternative defense strategy" and "basic strategic decisions" tests applied by the various circuits. This assertion is unfounded. It is no answer that here – as in so many cases in which the Court grants certiorari – the terminology the courts use to describe the tests may be reconcilable in theory because a choice between alternative defense strategies "can" on some facts amount to a basic strategic decision. BIO 13. The critical point is that the standards mean very different things in practice. As the opening brief made clear, this difference is vividly illustrated by the contrast between the Second Circuit's approach in *United States* v. *Malpiedi*, 62 F.3d 465 (1995), and that of the Ninth Circuit in its opinion below.[2]

The facts in *Malpiedi* were very similar to those of this case. A government witness against the defendant had been accompanied by defendant's trial counsel to her appearance more than a year earlier in grand jury proceedings. The Second Circuit held that because counsel could have, but did not, cross-examine the government witness about certain inconsistencies in her grand jury testimony, there existed a plausible alternative defense strategy that conflicted with counsel's ethical duties to the witness (with whom, the court found, counsel had had an attorney-client relationship). *Id.* at 470.

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[2] The Second Circuit has recently reaffirmed its "relatively low" standard: "a defendant represented by conflicted counsel need not demonstrate that the alternative strategy or tactic foregone by counsel was reasonable. Rather, the defendant need only prove that the alternative strategy was plausible." *United States* v. *Feyrer*, 333 F.3d 110, 118 (2003). The question is whether "some plausible alternative defense strategy or tactic might have been pursued," such that the defendant need merely show "only that '[the tactic] possessed sufficient substance to be a viable alternative." *Id.* at 116. It remains clear in the Ninth Circuit, by contrast, that the showing of adverse effect in that circuit is a "*substantial* hurdle," for it "must be one that *significantly worsens* counsel's representation of the client." *Plancarte* v. *Plummer*, No. C-02-5132, 2003 U.S. Dist. LEXIS 14473, at *18 (N.D. Cal. Aug. 13, 2003) (emphases added).

In reaching this decision, the court of appeals disregarded the trial court's findings that counsel's cross-examination of the witness was "overall, very effective," that counsel had impeached her credibility with other, stronger evidence, that he had "indirectly" established the conflicts with her grand jury testimony, and that the testimony he failed to elicit would have been merely cumulative of other evidence of her lies. *Id.* at 468-69, 470. The court found that all these factors – which go to whether counsel would have or should have cross-examined the witness about the grand jury testimony absent his conflict of interest – were irrelevant to the question of whether a plausible alternative strategy (*i.e.*, asking her those questions) was available. The court explained:

> This is not a test that requires a defendant to show that the alternative strategy or tactic not adopted by a conflicted counsel was reasonable, that the lapse in representation affected the outcome of the trial, or even that, but for the conflict, counsel's conduct of the trial would have been different. * * * The test is a strict one because a defendant has a right to an attorney who can make strategic and tactical choices free from any conflict of interest. * * * Counsel's inability to make such a conflict-free decision is itself a lapse in representation.

Id. at 469. The court also found that the attorney's cross-examination of the witness was hampered by his inability to reveal communications between himself and the witness due to his duty to respect the attorney-client privilege. *Id.*

The contrast between this analysis and that of the Ninth Circuit below could not be more stark. If anything, petitioner's case is substantially stronger than that of Malpiedi. Here, not only was attacking Swan a plausible alternative strategy or tactic, Swan was the centerpiece of the government's case; blaming Swan was essentially the only defense strategy that had any chance of succeeding; and yet counsel (who had represented the witness for many months rather than merely accompanying him to one previous hearing) utterly failed to do so until the eleventh hour. Yet the Ninth Circuit maintained that this last-

ditch strategy of desperation amounted to "precisely the type of representation" petitioner would have received if his counsel had been pinning the blame on Swan all along. Pet. 15a. Under the *Malpiedi* analysis, this result is incomprehensible. Clearly, petitioner's counsel was unable to make "a conflict-free decision" as to whether to blame Swan at the time that he made his opening statement and cross-examined Swan; this itself, under *Malpiedi*, amounts to an "adverse effect" on petitioner's representation. The Ninth Circuit also conceded that petitioner's counsel failed to elicit the fact that Swan had lied to counsel during his prior representation, but dismissed this fact as irrelevant because no other lawyer would have been able to elicit this information either – a result inconsistent with *Malpiedi*'s treatment of counsel's inability to seek privileged information as an aspect of his conflict of interest.

Amici also identify a second, closely related circuit conflict that would be resolved by this case. See NACDL Br. 16-18, Ethics Experts Br. 9-12. This split relates to the defendant's burden of proof: several courts of appeals require a defendant to prove that his counsel's conduct "would have been" different (*United States* v. *Burgos-Chaparro*, 309 F.3d 50, 53 (CA1 2002)) but for the existence of the conflict of interest. See NACDL Br. 16 (listing circuits imposing a "proximate cause" requirement). Other circuits have recognized, however, the near impossibility of establishing how unconflicted counsel would have performed, and do not require the defendant to show "that, but for the conflict, counsel's conduct of the trial would have been different." *Malpiedi*, 62 F.3d at 469; see also, *e.g.*, *Rubin* v. *Gee*, 292 F.3d 396, 404 (CA4 2002) (requiring only the existence of a reasonable alternative strategy that counsel "*might have* pursued" (emphasis added)). These courts recognize that counsel's "inability to make * * * a conflict-free decision is itself a lapse in representation." *Malpiedi*, 62 F.3d at 469. This latter approach is far more consistent with this Court's repeated warnings against "unguided speculation" in conflict-of-interest cases (*Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978) (noting that the effect of a conflict on an attorney's conduct is "virtually impossible" to measure); accord *Strickland* v. *Washington*, 466

U.S. 668, 692 (1984)), and this Court should take advantage of this opportunity to adopt it.

2. Because the conflict is clear, the government hopes to avoid review on the ground that *Mickens* v. *Taylor*, 535 U.S. 162 (2002), will bring the circuits into line. In particular, the government points to dictum in *Mickens* stating that *Sullivan*'s "adverse effect" test is satisfied "if the conflict has significantly affected counsel's performance." *Id.* at 173. But no circuit prior to *Mickens* applied an "*in*significant effect" test, and the government never explains how *Mickens* could be read to change the lower courts' settled precedents.

The government's contention that *Mickens* will change the law is moreover a testable proposition, and it is demonstrably incorrect. In *Mickens*, this Court did not grant certiorari on, receive briefing and argument regarding, or (most importantly) *decide* the meaning of *Sullivan*'s "adverse effect" standard. Rather, the narrow question was whether *Sullivan* – as opposed to a rule of automatic reversal – applies when a trial court fails to conduct an inquiry into a conflict about which it knew or should have known. This Court specifically cautioned against reading its decision more broadly. 535 U.S. at 174 ("Lest today's holding be misconstrued, we note that the only question presented was the effect of a trial court's failure to inquire into a potential conflict upon the *Sullivan* rule that deficient performance of counsel must be shown.").

The lower courts have correctly heeded this Court's admonition, and while numerous attorney conflict cases have been decided subsequent to *Mickens*, no court – state or federal – has read this Court's ruling to affect its prior precedent on the question presented by this case. *Mickens* has been cited in eighty-seven federal court rulings, thirty-nine state court rulings, twenty-five law review articles, and two treatises. In all this extensive study and application of *Mickens*, there has not been a single instance in which that decision has been read to change the legal standard. The few cases that even cite the "significantly affected" phrase from *Mickens* rightly regard it as interchangeable with *Sullivan*'s "adversely affected" standard. See, *e.g.*, *Thomas* v. *Sims*, No. 02-2494, 2003 U.S. App. LEXIS

17932 (CA7 Aug. 25, 2003); *Skinner* v. *Duncan*, No. 01-Civ.-6656, 2003 U.S. Dist. LEXIS 10102, at *150-51 (S.D.N.Y. June 17, 2003); *Quinones* v. *Miller*, No. 01-Civ.-10752, 2003 U.S. Dist. LEXIS 9176, at *92 (S.D.N.Y. June 3, 2003). And subsequent to *Mickens*, a further nineteen decisions have applied the "alternative defense strategy" standard without citing *Mickens* at all. (This data also confirms that the questions presented arise with great frequency.)

Respondent attempts to preempt this onslaught of authority by speculating that it has not been necessary to address the implication of *Mickens* because the courts have not yet found Sixth Amendment violations under their prior tests. That is not so; recent decisions have vacated convictions under *Sullivan* on the basis of an "adverse effect" from attorney conflicts, applying their prior precedent without reading *Mickens* to change the law at all. *Rubin* v. *Gee*, 292 F.3d 396, 404 (CA4 2002); *Eisemann* v. *Herbert*, No. 99-CV-2826, 2003 U.S. Dist. LEXIS 13222 (E.D.N.Y. July 31, 2003); *State* v. *Mohrman*, C.A. No. 02CA008053, 2002 Ohio 6610 (Ohio Ct. App. Dec. 4, 2002).[3]

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for a writ of certiorari, certiorari should be granted.

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[3] *Mickens* furthermore rejected the argument that this Court in *Wood* v. *Georgia*, 450 U.S. 261, 272 (1981), intended to limit an "adverse effect" to circumstances in which "counsel was influenced in his basic strategic decisions." Contra BIO 11. As *Mickens* explains, this language specifically represents the *Wood* Court's "description of why it could not decide the case without a remand." 535 U.S. at 172. *Mickens* then rejected the argument that *Wood* lowered the bar for establishing a Sixth Amendment violation. This Court's reasoning in *Mickens* is equally applicable to respondent's equally insupportable claim that the Court in *Wood* purported to *raise* the bar: "The notion that *Wood* created a new rule *sub silentio* – and in a case where certiorari had been granted on an entirely different question, and the parties had neither briefed nor argued the conflict-of-interest issue – *is implausible*." *Id.* (emphasis added).

Respectfully submitted,

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